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In The

# Supreme Court of the United States

No. 799

TERM 1968

THE LOCUST CLUB OF ROCHESTER, JOHN HUNT, BENNIE JASKOT, GEORGE SIGNOR, RICHARD STERLING, ANTHONY D'ANGELO, NELSON EVANS and JOSEPH FAVATA, all having offices or residing in the City of Rochester, County of Monroe and State of New York,

*Appellants,*

*vs.*

THE CITY OF ROCHESTER, HENRY GILLETTE, FRANK LAMB, RAYMOND LILL, WILLIAM MALOY, JR., WILLIAM J. MALLEY, MARIO PIRRELLO, WILLIAM LEGG, PETER BARRY and HYMAN FREEMAN, as Members of the Common Council of the City of Rochester; THE POLICE ADVISORY BOARD and DR. KENNETH W. WOODWARD, RABBI HERBERT BRONSTEIN, DR. WILLSON H. COATES, EDGAR S. LAMBERT, JAMES S. MALLEY, THE REV. DONALD J. MULCAHY, THE REV. JAMES A. ROCKWELL, ANTHONY R. SCHNEIDER and ROSS GUGLIELMINO, as Members of the Police Advisory Board, all having offices or residing in the County of Monroe and the State of New York,

*Respondents.*

**ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK**

**JUDICIAL STATEMENT**

*—Over—*

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Rochester, New York
(7673)

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*Respondents.*

## ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

## JUDICIAL STATEMENT

Appellants appeal from the judgment, decision, and/or order of the Court of Appeals, State of New York, entered

in the Court of Appeals on June 14, 1968, affirming the order of the Appellate Division, Fourth Judicial Department, of the State of New York, entered on January 11, 1968, which order reversed, on the law and facts the order of the Supreme Court of the County of Monroe, State of New York, which order declared portions of the ordinance establishing the Police Advisory Board invalid and unconstitutional; the said Appellate Division holding the said ordinance valid and constitutional; and Appellants appeal from the order of the Court of Appeals denying Appellants motion for re-argument, which order of the Court of Appeals was made and entered on September 26, 1968; and which order also recited that upon the appeal there were presented and necessarily passed upon questions under the Constitution of the United States and the said Court of Appeals held that Appellants constitutional rights were not violated.

## I. OPINIONS BELOW

The opinions in the Courts below were reported in:

48 MISC. 2d 763, 265 N.Y.S. 2d 744;

29 A.D. 2d 134, 286 N.Y.S. 2d 99;

22 N.Y. 2d 802, 293 N.Y.S. 2d 903.

Annexed hereto and made a part hereof is Appendix A setting forth the opinions of the Supreme Court, Monroe County, State of New York; the opinion of the Appellate Division, Fourth Judicial Department, State of New York; and the opinion of the Court of Appeals of the State of New York together with the dissenting opinion.

## II. GROUNDS OF JURISDICTION.

a) Plaintiffs-Appellants, brought this proceeding seeking a declaratory judgment as to the validity, legality and constitutionality of the ordinance of the City of Rochester establishing the Police Advisory Board. The declaratory judgment procedure is provided for in the Civil Practice Law and Rules of the State of New York, Section 3001, which section was formerly Civil Practice Act, Section 473, of the State of New York.

b) The Supreme Court, Special Term, Monroe County, entered an order declaring the ordinance establishing the Police Advisory Board invalid in part, which order was duly executed February 2, 1966 and entered February 4, 1966. Thereafter, upon appeal, the Appellate Division, Fourth Judicial Department, entered an order on January 11, 1968 reversing the order of the Special Term and directing entry of an order and/or judgment declaring the ordinance valid and constitutional. Thereafter, Plaintiffs-Appellants, appealed to the Court of Appeals of the State of New York, which, upon the opinion of the Appellate Division affirmed the order of the Appellate Division on June 14, 1968 with Judge J. Scileppi dissenting. Thereafter a motion was duly made on or about July 10, 1968 for re-argument and to amend the remittitur. The Court of Appeals on September 26, 1968 entered an order denying the motion for re-argument and amended the remittitur to show the following:

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Plaintiffs argued that the ordinance creating the Police Advisory Board violated due process requirements in that the standards or norms of action were indefinite and vague; denied equal protection under the law to police officers; permitted Bills of Attainder contrary to Ar-

ticle I of the Constitution; and violated the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution. 'This court held that plaintiff's constitutional rights were not violated.'' See Exhibit C.

The Notice of Appeal was duly served on Robert Feldman, Attorney for the Respondent, City of Rochester, and on Ross Guglielmino, Attorney for the Police Advisory Board, on November 12, 1968. The said Notice of Appeal also was filed in the Monroe County Clerk's Office, Monroe County, and the Court of Appeals on the following respective dates:

November 12, 1968

c) Jurisdiction is conferred upon the Supreme Court of the United States by 18 U.S. Code Section 1257 (2).

d) Cases believed to sustain the jurisdiction of the United States Supreme Court are:

*Jamison vs. Texas,* 318 U.S. 413, 414 (1943);

*King Mfg. Co. vs. City Council of Augusta,* 277 U.S. 100 (1928);

*Lehon vs. City of Atlanta,* 242 U.S. 53 (1916);

*Lovell vs. Griffin,* 303 U.S. 444, 450 (1937);

*Poulos vs. New Hampshire,* 345 U.S. 395, 402 (1952);

*Staub vs. City of Baxley,* 355 U.S. 313, 321 (1957).

e) The validity of Sections 17-1 to and including 17-25 of the Code of the City of Rochester Volume I is contested herein. The said sections are contained in Volume I of the Code of the City of Rochester, pages 1701 through and including page 1707. Annexed hereto and made a part hereof is Exhibit B wherein is contained the aforementioned Sections being part of Chapter 17 of the Code of the City of

Rochester, New York, whereby the City of Rochester established the Police Advisory Board. Annexed hereto and made a part hereof and also contained in Exhibit B herein are the Rules of Practice and Procedure of the said Police Advisory Board.

## III. QUESTIONS PRESENTED.

1. Whether the ordinance establishing the Police Advisory Board of the City of Rochester is unconstitutional by reason of the fact that the said ordinance constitutes a Bill of Attainder in violation of the United States Constitution Article I Section 10.

2. Whether the ordinance, the rules promulgated thereunder, and the Police Advisory Board's recommendations and decisions are unconstitutional by constituting Bills of Attainder or Bills of Pains and Penalties issued against named American citizens contrary to United States Constitution Article I Section 9.

3. Whether the rulings and determinations of the Police Advisory Board are in fact determinations of criminality for which the accused is entitled to the safeguards and immunities granted by the United States Constitution and the Bill of Rights.

4. Whether the Police Advisory Board is granted a power of issuing general warrants against American citizens, namely police officers, in violation of the Fourth Amendment of the United States Constitution.

5. Whether the procedure of the Police Advisory Board violates the Fifth Amendment of the United States Constitution in compelling testimony of an accused against himself under the threat of the accused's loss of good name or

public employment, and in that various records of the accused individual are made available to the Police Advisory Board without the consent of the accused, which records and testimony have been secured under the threat of the possible loss of public employment.

6. Whether the denial of the right to trial by jury, the denial of the right of confrontation, and compulsory process where the accused is charged with acts that are criminal in nature in the State of New York constitutes a violation of the Sixth Amendment of the United States Constitution.

7. Whether the use of infamy as a means of reprisal for criminal acts against an accused constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

8. Whether the ordinance establishing the Police Advisory Board is unconstitutional by reason of exposing the accused to double jeopardy, deprivation of his right to confront his accusers, deprivation of the right to be tried by an impartial tribunal, deprivation of the right to subpeona witnesses and establish a defense, deprivation of the right to a hearing, deprivation of the right to a public hearing, the deprivation of the right to appeal an adverse decision and the deprivation of the right to be charged under a known and existing law which deprivations constitute a violation of the Fifth and Fourteenth Amendments of the United States Constitution.

9. Whether the ordinance is invalid by reason of vagueness and indefiniteness of the prohibited conduct under the ordinance and therefore violates due process of law under the Fourteenth Amendment of the United States Constitution.

10. Whether the ordinance is an improper exercise of the police power and also constitutes a denial to the equal

protection of the law to members of the police force in violation of the Fourteenth Amendment of the United States Constitution in that the substantive and procedural safe guards available to other citizens are denied to police officers.

11. Whether the public employment of a police officer can be conditioned upon the surrender of constitutional rights which cannot be abridged by direct governmental action.

12. Whether official governmental comment constituting an accusation, condemnation or censure of named individuals is a constitutionally protected criticism under the right of free speech.

## IV. STATEMENT OF THE CASE.

On March 26, 1963 the Council of the City of Rochester adopted an ordinance whereby a Police Advisory Board of nine (9) members was established having jurisdiction to investigate complaints alleging "excessive or unnecessary physical force" by members of the Rochester Police Bureau. Although the Board's powers were designated to be advisory in nature the Board in fact had the power to make recommendations after its investigations. The investigations of the Board are conducted in secret and the accused is not entitled to a hearing. If the complaining party demands a hearing, the hearing is held in secret. Although there is a theoretical right of confrontation, the Board does in fact act without the complaining witness being present or being subjected to cross-examination; the accused has no subpeona power; the tribunal is made up of persons who at least appear to be temperamentally hostile to the police and ignorant of police problems; police officers under the procedure of the Police Advisory Board are ac-

cused of acts which are criminal in nature under the laws of the State of New York; the records and transcripts of other departmental proceedings with reference to police misconduct are automatically turned over to the board under the statutory obligation of the Department of Public Safety to "cooperate" with the board. These records are made available despite the fact that they are secured under the threat of the loss of employment of the police officer and he has no means of preventing their being made available to the board. In the event that the city administration of the City of Rochester fails to act in accordance with the "recommendations" of the board then the board is permitted to use publication of its findings and recommendations to coerce the City of Rochester to act in accordance with its dictates. Even if the City of Rochester refuses to act on the dictates of the Board then the publication of the board's findings constitutes a public censure and an accusation of a criminal act of the accused police officer. The police officer has no legitimate tribunal whereby he can objectively contest the findings of this board. He has no tribunal to which to appeal. If the City Administration punishes the officer in accordance with the dictates of the board, then the Civil Service Law of the State of New York governing the employment of civil servants is effectively circumvented. Since the Civil Service Law of the State of New York governs the conduct of public employment in the State of New York, the sole purpose of the Police Advisory Board is not to regulate public employment, but to effect punishment of the accused police officers through a non-judicial tribunal.

On April 22, 1964 a Rochester newspaper published "Policeman Cleared of Brutality Charge By Advisory Board." Furthermore, a complaint against one George Signor was adjudicated by the board in the following manner:

> "Because of the incompleteness of the investigation, due in part to the inability of the complainant to be present at a hearing before the Board, the evidence presented to the Board is inconclusive. Although the evidence adduced is inconclusive, it is of such a character that it cannot be ignored. Therefore, the Board has voted to accept the recommendation of the City Administration that this complaint, it's investigation, and findings, be made a part of your official personnel files." Decision of the Board dated March 17, 1965.

At the present time there is also pending a complaint against one John Hunt, a party to the proceeding herein. There are also several other complaints pending against members of the Rochester Police Force which occurred after the litigation herein was commenced.

It is significant that the only riot in the history of the City of Rochester took place during the period that the Board was in full operation, that is the month of July, 1964. By complaint dated April 14, 1965, the Plaintiffs-Appellants herein commenced suit to declare the ordinance establishing the Board a nullity as violating the Constitution of the United States of America.

Thereafter Judge Jacob Ark by memorandum decision dated December 30, 1965 declared part of the ordinance invalid as violate of the rights of police officers. On January 11, 1968 the Appellate Division, Fourth Department, of the State of New York ruled that the decision of Judge Ark should be reversed and "judgment entered declaring chapter 17 (formerly Chapter 10) of the Code valid and constitutional." Thereafter on June 14, 1968 the Court of Appeals rendered a decision upholding the decision of the Appellate Division upon the opinion of the Appellate Division. The Court of Appeals on September 26, 1968 denied

Plaintiffs-Appellants motion to re-argue the matter of the case herein and granted a motion to amend the remittitur to show that federal questions were necessarily raised and decided by the Court of Appeals. The said amended remittitur is annexed hereto and made a part hereof as Appendix C.

## V. THE QUESTIONS ARE SUBSTANTIAL.

A. The Police Advisory Board is not only granted an investigatory power, but also an accusatorial and censorial power against named citizens in violation of Article I Section 10 of the United States Constitution prohibiting Bills of Attainder. See *Lovett vs. United States,* 328 U.S. 303 (1946); *United States vs. Brown,* 381 U.S. 437 (1965).

B. The Police Advisory Board presupposes a power in government to make determinations of criminality of the acts or omissions of certain citizens without a judicial trial, without regard to the substantive and procedural law available to other citizens, and without due process of law in violation of the Fifth Amendment and Fourteenth Amendment of the United States Constitution.

C. No fixed norm or standard of action is prescribed for the police officers nor for the jurisdiction of the Board in violation of the Fourteenth Amendment of the United States Constitution. Culpability is determined solely by the subjective dictates of the inquisitors. *Winters vs. State of New York,* 333 U.S. 507, 515 (1948); *Keyishian vs. Board of Regents,* 385 U.S. 589 (1966). The police officers charged under the ordinance are not only denied of their right to be tried and charged pursuant to the Civil Service Law of the State of New York but they are also denied the right to be tried and charged in the manner that other persons accused of criminal acts are tried and charged. This

constitutes a violation of the equal protection of the laws guaranteed to each citizen by the Fourteenth Amendment of the United States Constitution. The purpose of the ordinance is punishment and procedural safeguards should be available. See *Kennedy vs. Mendoza,* 372 U.S. 144 (1961).

D. Under the statutory duty to "cooperate" the privacy and security of police officers is violated in desregard of the Fourth Amendment of the United States Constitution. See *Camara vs. Municipal Court of City and County of San Francisco,* 387 U.S. 523 (1967). The obligation to turn over civil service records and other records of the police officer together with the general duty on the part of the police officers to "cooperate" constitutes a general warrant against the person and property of the accused police officer in violation of the aforementioned amendment. See *See vs. City of Seattle,* 387 U.S. 541 (1967) and *Berger vs. State of New York,* 388 U.S. 41 (1967).

E. By making available civil service records and testimony secured from police officers through the Internal Inspection Division of the Department of Public Safety, the Police Advisory Board is permitted to secure testimony and evidence of the police officers which can result in not only the censorial judgment of the Board but also may be the basis of criminal prosecution thereafter. This power of the board effectively strips police officers of the constitutional cloak of protection guaranteed to all citizens by the Fifth Amendment. See *Garrity vs. State of New Jersey,* 385 U.S. 493 (1967). The threatened loss of professional standing not only constitutes a form of punishment but also an effective force of governmental compulsion. See *Spevack vs. Klein,* 385 U.S. 511 (1967). The principal against double jeopardy and the right to be accused by a grand jury under the Fifth Amendment are effectively frustrated.

F. In granting the Board a power to determine the criminality of acts without the safeguard of jury trial, the board is able to proscribe the punishment of infamy or require the loss of employment without the accused being granted the right to trial by jury in violation of the Sixth Amendment of the United States Constitution. See *Bloom vs. Illinois,* 20 L. Ed. 2d 522 (1968) and *Application of Gault,* 387 U.S. 1 (1966). In violation of the aforementioned amendment the accused is also denied the right to confront his accuser.

G. The use of public condemnation which could justify private redress for unrequited wrongs can also be considered a form of cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution in that, in effect, citizens are instigated to seek personal vengence rather than the ordinary procedure of law.

H. The Fourteenth Amendment requires at least that basic rules of fairness be used in hearings of charges against citizens. The ordinance establishing the Police Advisory Board does not give the accused a right to a hearing; if a hearing is held at the request of the accuser, the hearing is secret; the accused has no right to subpeona witnesses nor to effectively confront his accuser; after a determination by the inquisitors whom he cannot challenge for bias or prejudice, the accused has no right of appeal; no rule or norm is established protecting police officers from unwarranted charges and accusations; the right to have a attorney present only serves to give an aura of legitimacy to a kangaroo Court; the use of statements derived under governmental compulsion and the ability of the board to comment upon the refusal of police officers to appear before it also effectively undermine the Fifth and Fourteenth Amendments. Instead of trial in an orderly manner, the accused is tried by a committee having no other legitimate

govermental purpose. See *Kilbourn vs. Thompson,* 103 U.S. 168 (1888).

I. Does the right of free speech include in it a power of government to make censorial comment upon the conduct of citizens by reason of the doctrine enunciated in *New York Times vs. Sullivan,* 376 U.S. 254 (1964) without a judicial trial.

The aforementioned issues presented by the ordinance establishing the Police Advisory Board are substantial because they involve the very well springs of governmental power in the government's relationship with the individual citizen. Not only are the rights of police officers as citizens grossly violated, but the effective paralysis of the police force by such a board effectively destroys the primary obligation of government to preserve the life and property of citizens from criminal activity. A further disintegration of respect for law may ultimately result in the destruction of republican government in our nation.

## VI. CONCLUSION.

The issue is squarelf presented whether a citizen is stripped of all constitutional rights the moment he dons the uniform of a police officer. Appellants respectfully request that briefs be submitted and the case be argued orally before this tribunal.

Respectfully submitted,

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